Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	MB Docket No. 12-203
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)))	MB Doc. No. 07-198

Comments of Adam Lynn

Executive Summary

The comments provided below are meant to assist the Commission in their annual assessment of the environment for competition in the delivery of video programming. The largest cable programmers, referred to by the Commission as a "key industry input", possess grossly excessive market power that has resulted in serious negative consequences for the delivery of video programming. The included analysis demonstrates this, in part, by highlighting the following points:

- Skyrocketing programming fee increases from the largest video distributors are a primary reason for incessant price increases being levied on financially hard hit Americans.
- These cost increases are a direct result of the high level of concentration in the cable programming industry, with six companies owning 42 of the top 50 cable networks.

- Video distributors, financial analysts and, in some cases, cable programmers themselves have recognized that the large cable programmers possess and exercise the market power.
- Dozens of cable channels enjoy profit margins in excess of 50 percent with subscribers footing the bill every month.
- Without a policy intervention to curb programmers' abuse of market power, the constant fee increases will continue resulting in higher monthly bills.
- Despite palpable consumer demand, online video alternatives have not been able to discipline multichannel video distribution rate increases. Both video distributors and large cable programmers share blame for this market failure.

The Commission should immediately take incremental steps to address this issue and lay the groundwork for wholesale remedies. Without action on the part of the Commission, the consequences of these market abuses will grow and consumers will continue to suffer.

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The Commission requests "data, information, and comment" in advance of crafting their fifteenth "Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming" (herein "MVPD Competition Report"). As a member of the public and one of the millions of dissatisfied cable subscribers, I submit the following information to assist the Commission's forthcoming analysis.

While an abundance of problems exist within the Multichannel Video Programming Distributor (MVPD) market, these comments are focused on what the Commission rightly refers to as a "key industry input" - video content creators and aggregators. Independent programmers offer critical contributions and are an essential component to a healthy content ecosystem. A considerable level of evidence exists demonstrating the tremendous carriage difficulties they face. Tragically, outside of

[1] These comments are the personal comments of Adam Lynn. They are certainly in no way affiliated with any current or former employer. No financial compensation from any party was provided for their creation, though if they help to limit the skyrocketing cost of viewing cable programming as an MVPD subscriber I would directly benefit.

the steps the Commission has taken through merger proceedings,[2] those difficulties are now so ingrained that the greater problem warranting the Commission's focus is the overall market for cable programming.

It appears that the market for cable programming has reached a critical juncture. As cable operators grew in size, primarily through acquisitions, cable programmers similarly achieved growth through M&A activity. This is likely due, in part, to stay competitive in programming contract negotiations. This development resulted in an ever-increasing number of channels being bundled together. This has led to a heavily concentrated market for cable programming. These constant forced additions resulted in balance sheet and margin increases for large cable programmers. Margins that were already high as a result of, in most cases, requiring consumers to both watch advertising and pay monthly fees.

The never-ending consumer rate increases are a result of this imbalance in negotiating power. This imbalance is due to a combination of factors. While a thorough examination of the causes for this development is an important undertaking, these comments are focused on the present environment and the serious consequences, both immediate and future, which have resulted.

[2] *See* Federal Communications Commission, In the Matter of *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Report & Order, MB Docket No. 10-56, Appendix A, Section III, 3 (Released January 20, 2011).

Ultimately, the lack of robust competition prevalent across this entire ecosystem has resulted in MVPD subscribers bearing the brunt of the consequences. MVPDs simply pass along the increased programming costs to consumers, and in some cases increase their own margins as well.[3] These opaque price increases are why consumers have generally positive views of cable networks and such low satisfaction with MVPDs.

As a result of escalating programming rate increases (known as affiliate fees), particularly with the recent decline in household income and stagnation in subscriber growth, a host of MVPDs are expressing concern about the environment that's been created by the largest cable programmers.[4] Below I offer a preliminary examination of the present environment that is meant to assist the Commission in their analysis of the MVPD ecosystem.

1. **The Cable Programming Market is Broken and Consumers are Paying the Price.**

Consumers have long complained about the constant price increases from MVPDs.[5] As a result, Congress has repeatedly decried these actions and, in some cases, provided the Commission with additional authority and instruction to rectify these

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[3] Throughout these comments, MVPDs will be referred to as a uniform entity. This is a result of identifying positions that are increasingly ubiquitous across MVPDs. Nonetheless, on a variety of issues outside the scope of these comments a diversity of viewpoints exist.
[4] *See e.g.* Sabrina Tavernise, "U.S. Income Gap Rose, Sign of Uneven Recovery," *New York Times,* Sept. 12, 2012.
[5] *See e.g.* Matt Honan, "Why the Government Won't Protect You from Getting Screwed by Your Cable Company," *Gizmodo*, Aug. 15, 2011.

problems. The Commission should ensure it fully understands and highlights the reasons behind these prices increases in its upcoming MVPD Competition Report.

a. Cable Content Prices Have Risen Dramatically

Programming costs are by far the largest component of video distributors' expenditures, and rightly so. It is what makes the service valuable to consumers. Nonetheless, in more recent years, programming cost increases have escalated out of control. As the Commission noted in the *Fourteenth Report*, "cable networks contribute anywhere from 60 percent to more than 90 percent of companywide earnings before interest and taxes."[6] Commissioner Clyburn recently called these constant rate increases "worrisome."[7]

One can look to the rising chorus of opposition from MVPDs to recognize the problem in the current pricing environment for cable programming. During a recent programming dispute, Time Warner Cable stated, "television networks can't continue to demand huge price increases and expect us to silently pass those cost increases on to our customers."[8] During DirecTV's contract dispute with Viacom, numerous competitors took the unprecedented step of publicly supporting their

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[6] Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourteenth Report, paragraph 367, footnote 1192 (Released July 20, 2012) ("*Fourteenth Report*").

[7] "Investor Chat – Cablevision, TWC Tackle Programming Costs, M&A, More," CableFAX, Sept. 13, 2012.

[8] Ben Fox Rubin, "Time Warner Cable Argues Against 'Huge' Price Hikes from Programmers," *Wall Street Journal*, July 17, 2012.

competitor. Instead of trying to steal customers, Mediacom stated “the reality is that if we don't fix this long-term problem in the industry, we're all going to suffer."[9]

Dish Network told shareholders that “programming costs currently represent the largest component of our total expense and we expect these costs to continue to increase.”[10] Cablevision CFO Gregg G. Seibert recently told financial analysts that they’ve:[11]

> “been on the forefront of efforts in Washington to try and get the playing field a little bit more balanced on the programming side. It's not well balanced today, it does feel to me like something has to give, but I don't when that occurs, but the programming cost increases are, they are constant and they outstrip the ability of the industry to be able to pass those price increases along to customers.”

The Commission has heard plenty of complaints about these cost increases as well. In its comments in the instant proceeding, Verizon noted the “rising cost of acquiring video programming.”[12] DirecTV’s comments came with a sub-heading of “DIRECTV Faces Increasing Challenges in Obtaining Programming at Reasonable Prices.”[13] Cox Communications told the Commission that “programming costs are

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[9] Shalini Ramachandran, “DirecTV Finds Some Unlikely Friends,” *Wall Street Journal*, July 18, 2012.
[10] Dish DBS Corp., Annual Report, SEC Form 10-K, p. 5, March 19, 2012.
[11] Gregg G. Seibert, Chief Financial Officer & Executive Vice President Cablevision Systems Corp., Bank of America Merrill Lynch Media, Communications & Entertainment Conference, September 12, 2012.
[12] Comments of Verizion, MB Docket No. 12-203, Sept. 10, 2012, p. 5.
[13] Comments of DirecTV, LLC, MB Docket No. 12-203, Sept. 10, 2012, p. 18.

rising quickly."[14] Mediacom went a step further and told the Senate Commerce, Science and Transportation Committee that they are:[15]

> Prepared to commit to freezing its published rates for its most popular video service tiers (limited and expanded basic) for two years if the owners of the broadcast channels and cable networks on those tiers likewise agree to freeze the fees they charge for their content.

All of these statements come despite the potential damage such comments can have in future programming contract negotiations.

The MVPD's public statements for relief provide insight into the current environment for cable programming. However, it is much important for policymakers to rely on the actual numbers publicly available for some MVPDs.[16]

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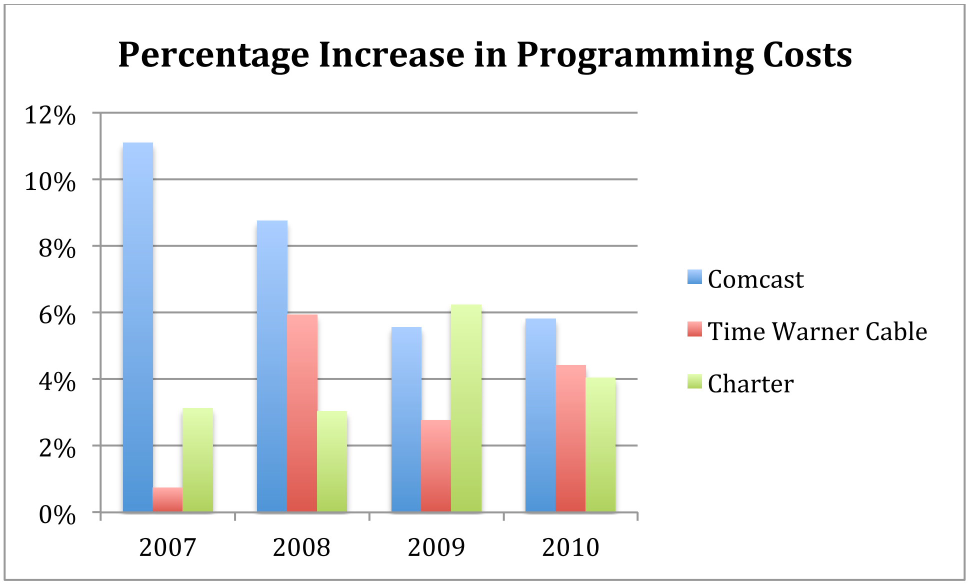
[14] Comments of Cox Communications, Inc., MB Docket Nos. 12-68, 07-18, 05-192, June 22, 2012.

[15] Letter of Rocco B. Commisso, Chairman and Chief Executive Officer, Mediacom Communications Corporation, July 20, 2012.

[16] The figures were culled from publicly available financial data including annual SEC filings (10-Ks), Trending Schedules and Annual Reports.

Figure 1:



In order to better understand the comments from MVPDs referenced above, Figure 2 looks at the rate increases as compared to overall video revenue that have occurred in the past five years.[17] Finally, Figure 2 shows the percentage change in programming costs versus the percentage change in video revenue.[18]

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[17] The figures were culled from publicly available financial data, including annual SEC filings (10-Ks), Trending Schedules and Annual Reports. The much higher costs for Charter are due to the volume discounts received by the very largest MVPDs. *See e.g.* Ex Parte of Cox Communications, MB Docket Nos. 12-203, 12-68, 07-18 and 05-192, Sept. 27, 2012.

[18] Some similar analyses were performed for Time Warner Cable in 2010. *See* Steven C. Salop et al., Video Program Costs and Cable TV Prices: A Comment on the Analysis of Dr. Jeffrey Eisenach (attached to Letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (June 1, 2010)).

Figure 2:

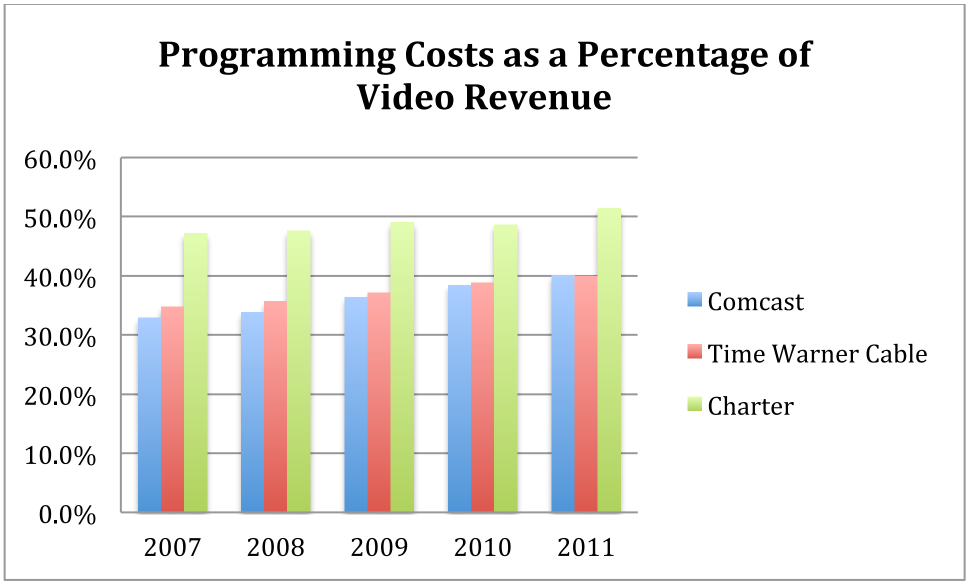
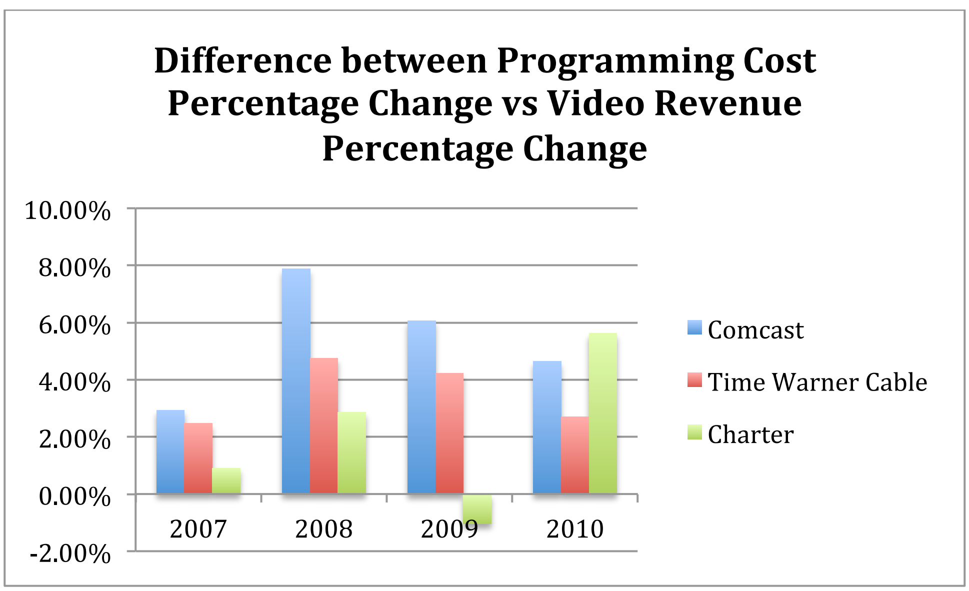


Figure 3:



These data provide ample evidence of the significant programming costs being pushed on MVPDs. This reality has the full attention of the industry's financial analysts. Merrill Lynch Analyst Jessica Reif Cohen called the incessant increases "a disturbing headwind for industry margins."[19] Sanford C. Bernstein Analyst Craig Moffett called the increases "a very genuine and legitimate concern that imperils the entire ecosystem."[20] Keith Nissen of The NPD Group stated, "As pay-TV costs rise and consumers' spending power stays flat, the traditional affiliate-fee business model for pay-TV companies appears to be unsustainable in the long term."[21] Spencer Wang of Credit Suisse stated, "we hope that [DirecTV's] willingness to 'just say no,' is contagious."[22] Wells Fargo Analyst Marcy Ryvicker went so far as to suggest MVPD's just become a "dumb pipe" and stop directly delivering cable programming entirely.[23]

These price increases pushed on MVPD's are promptly passed along to captive cable subscribers. The above evidence is not meant to provide justification for the rate increases assessed on MVPD subscribers or act as an apologist for MVPDs.[24] The FCC

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[19] Bank of America Merrill Lynch Media, Communications & Entertainment Conference, September 12, 2012.
[20] Joe Flint, "Analysts fear rising programming costs will hurt distributors," *Los Angeles Times*, May 21, 2012.
[21] The NPD Group, "The NPD Group: Average Monthly Pay-TV Subscription Bills May Top $200 by 2020," Press Release, April 10, 2012.
[22] David Lieberman, "Does Viacom Have More At Risk Than DirecTV Does In Programming Standoff?," *Deadline New York*, July 11, 2012.
[23] Joe Flint, "Analysts fear rising programming costs will hurt distributors," *Los Angeles Times*, May 21, 2012.
[24] Indeed, the US cable and satellite sector has seen their stock values grow significantly in the last couple years. Suddenlink's CEO recently commented, ""we're finally on the cusp of becoming what I like to call a cash-generating machine…Our

has previously found that even when cable operators realize cost savings in programming those savings are not passed along to customers.[25] Indeed, one analyst predicted that the current margins of large MVPDs would allow these programming rate increases to occur "until at least 2024."[26]

This does not mean MVPDs are not experiencing margin declines on video (particularly small MVPDs) just that almost all of these rate increases end up being passed along to MVPD subscribers in their monthly bills. Market researcher The NPD Group predicted earlier this year that average bill for cable or satellite service "may top $200 by 2020."[27] It should thus come as no surprise that a growing number of American households are considering canceling their MVPD service.[28]

In the midst of the largest and longest recession in generations, Americans are forced to pay an ever-increasing amount for their video entertainment. This is a trend that puts consumers in the cross hairs. Bernstein Research Analyst Craig Moffett stated "the disconnect between this increase and stagnant or falling income

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cash flow is going to be tremendous." Andrew Edgecliffe-Johnson, "Content's kingdom a worry for cable," *Financial* Times, April 18, 2012.

[25] *See e.g.* Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, Para. 155 (Released January 8, 2001).

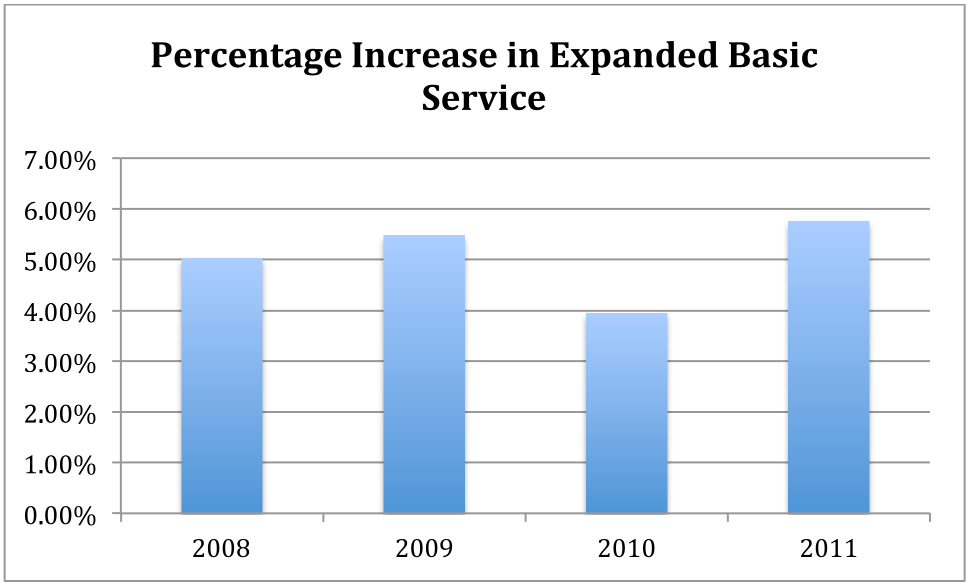
[26] Daniel Frankel, "Pay TV model won't die anytime soon, analyst says," *Paid Content*, July 30, 2012.

[27] The NPD Group, "The NPD Group: Average Monthly Pay-TV Subscription Bills May Top $200 by 2020," Press Release, April 10, 2012.

[28] *See e.g.* Todd Spangler, "About 20% of U.S. Pay-TV Subs Prone to Canceling: Analysts," *Multichannel News*, Sept. 16, 2011.

is striking."[29] Figure 4 highlights the subscriber price increases included in the Commission's latest report on cable industry prices.[30]

Figure 4:



While one can express concern about the effect this environment has on the MVPD business, the true victims are the nearly 100 million subscribers. Furthermore, as most MVPDs become reluctant to continue price increases, the Commission should be wary of the effect it will have on broadband prices. MVPD's will begin to look elsewhere to indirectly pass along costs to maintain or grow margins. Given the lack of adequate competition in the duopoly (increasingly monopoly) broadband access

[29] Ryan Lawler, "Big cable is facing an 'affordability crisis'," *GigaOm*, Sept. 14, 2011. *See also* Ryan Lawler, "Duh: Analyst Says TV Programming Price Increases Are Unsustainable And "A Train Wreck In The Making," *TechCrunch*, Oct. 1, 2012.
[30] Federal Communications Commission, Report on Cable Industry Prices, Table 3 (Released August 13, 2012) ("*Cable Price Survey*"). Due to a lack of having the same nationwide figures for programming cost increases, a percentage comparison was not included. In the latest *Cable Price Survey*, the Commission included the programming price for the last 2 years. For 2011, cable rates rose 5.55% and programming costs 5.41%. *See* Attachment 2.

market and the tremendous profitability of the service, cable operators are likely to raise rates on broadband services.[31]

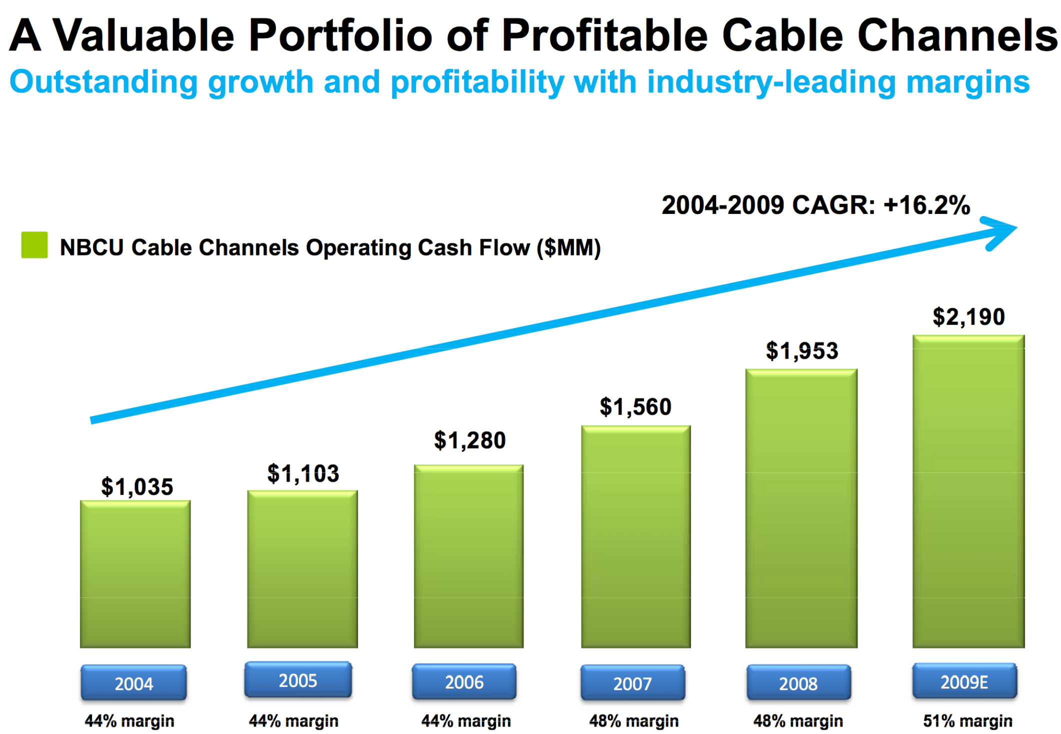
b. Programming Rate Increases Have Primarily Served to Increase Already Excessive Profitability to the Detriment of the Public.

A multitude of expenses could legitimately justify the escalating rate increases demonstrated above. One can certainly sympathize with managing costs for licensing rights or the variety of components for producing original programming such as equipment, talent, studio set related costs and promotional expenses, among many others. Despite this potential reasoning, the *Fourteenth Report* notes that the cash flow *margin* of basic cable networks has *grown* at least 1 percent year over year since 2006.[32]

SNL Kagan "expects cash flow, which grew 12.3 percent on a compound annual rate for 2006-2010 to rise 9.9 percent on an average basis for the 2011-2015 time frame."[33] The financial analysis firm also noted "more than 30 networks have margins of 50% or more."[34] Indeed, in the second quarter of 2012, Viacom noted their networks had an overall operating margin of 41 percent.[35] In touting their

[31] An incentive that only grows given the deterrent it provides towards reliance on online video offerings. A topic that is discussed more directly in Section 2.
[32] *Fourteenth Report*, Table 27.
[33] Georg Szalai, "SNL Kagan Sees 2011-2015 Basic Cable Networks Compound Annual Revenue Growth of 8%," *Hollywood Reporter*, Nov. 21, 2011.
[34] Harry A. Jessell, "Uncovering The Truth About Retrans Value," *TVNewsCheck*, Dec. 2, 2011.
[35] Viacom Inc., Q2 Earnings Cal Transcript, May 2, 2012.

NBCU merger to investors, Comcast provided a presentation slide that succinctly exhibits just how profitable it is to be a dominant cable programmer.[36]



Comcast CEO Brian Roberts stated:[37]

> I think this is a wow slide if there ever was one and pretty much speaks for itself. It's really what brings us to this transaction -- cable channels with outstanding growth and profitability. You just don't find too many businesses with growth rates of over 15% compounded for the past six years, and margins that are really the best in the business at nearly 50%.

In order to demonstrate the role of affiliate fee hikes in consumer price increases, a focus on overall cable network profitability does not adequately address the issue. Nonetheless, it aptly demonstrates that programming cost increases cannot be

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[36] Comcast Corp., Comcast-NBCU Investor Presentation, Slide 19, Dec. 3, 2009.
[37] Comcast Corp., Comcast-NBCU Investor Presentation Transcript, Dec. 3, 2009.

claimed to have necessitated the extent of the rate increases, including sports programming.[38]

With clear evidence increased content costs have not affected profitability, the natural next step is determining the extent rate increases have served to improve profit margins. A number of components can improve the profit margin of a cable network. These include growth in advertising, lower programming costs, improved secondary market sales and increased revenues from distributors either through subscriber growth or affiliate rate increases.

Unfortunately, detailed figures on the revenues derived from distributors are, in many cases, not publicly available. However, enough information is publicly available to demonstrate that affiliate fee rate increases play a significant role. It is worth noting, however, that one need only read the public statements and earnings releases about cable network revenue increases and improved profitability to see that affiliate rate increases are constantly attributed.

In their most recent financial quarter, News Corporation saw affiliate revenue grow 16% due to "higher rates across all networks."[39] In 2011, Disney told investors that 6 percent of their 9 percent growth in affiliate fees came from "higher contractual

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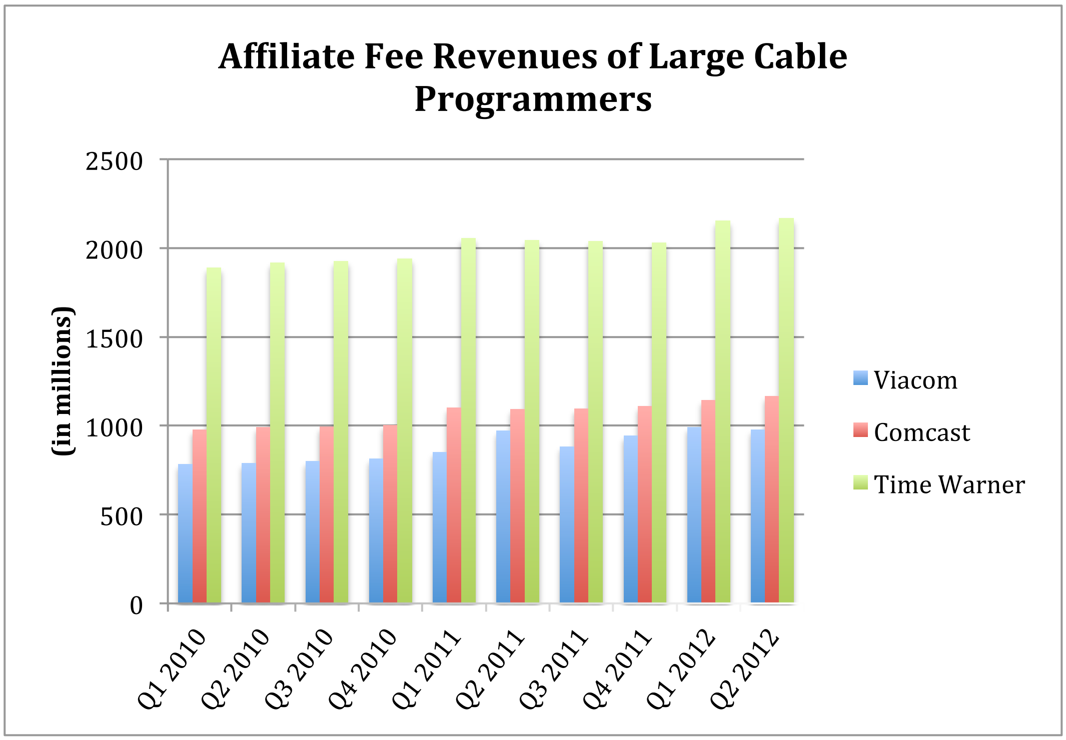
[38] *See e.g.* Meg James, "Cable TV networks feel pressure of programming costs," *Los Angeles Times*, Dec. 8, 2011.
[39] News Corporation, 2012 Fourth Quarter and Year End Earnings Release, Aug. 8, 2012.

rates."[40] SNL Kagan has noted that overall affiliate fees from cable, satellite and telco providers have been growing on average 12% per year.[41] Time Warner CFO John K. Martin recently told financial analysts "from the beginning of the affiliate rate renewal cycle till the end of the affiliate rate renewal cycle, which is the end of '16, our expectations are to achieve double-digit domestic affiliate revenue increases."[42]

Figure 5:[43]



The above chart illustrates the constant increases in affiliate fees, which did not come from increases in the number of multichannel subscribers.[44] Indeed, despite

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[40] The Walt Disney Company, 2011 SEC Form 10-K, p. 30.
[41] Comcast Corp., Comcast-NBCU Investor Presentation, Slide 18, Dec. 3, 2009.
[42] Time Warner, Inc., Q2 Earnings Call Transcript, August 1, 2012.
[43] Time Warner does not separate domestic and global affiliate fee revenues hence the higher figures for their operations.
[44] Shalina Ramachandran, "Evidence Grows on TV Cord-Cutting," *Wall Street Journal*, Aug. 7, 2012.

the financial success described above, Viacom increased the amount of advertising on certain networks following recent declines in viewership.[45] Finding yet another means to take advantage of captive MVPD subscribers.

With the understanding that consumers are the cause for these profitability increases, it is worth determining where their money is going. It seems much of it ends up in stock buybacks and quarterly dividends. In about the last year alone:

- Viacom increased their quarterly dividend 10 percent; [46]
- Disney began a $16 billion share buyback[47] and raised their dividend to the highest level in 20 years;[48]
- News Corp raised their dividend for the first time in two years;[49]
- Discovery increased their share buyback by 50 percent to $3 billion; and[50]
- Time Warner announced a $4 billion stock buyback.[51]

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[45] Suzanne Vranica and John Jannarone, "Viacom Loads More Ads on Channels," August 26, 2012.
[46] *See e.g.* Viacom Corporation, "Viacom Increases Quarterly Cash Dividend," Press Release, May 23, 2012 ("Viacom Inc. today announced that its Board of Directors has approved a 10% increase in its quarterly dividend").
[47] John Shmuel, "Disney Quietly approves US$16-billion share buyback," *Financial Post*, May 16, 2011.
[48] Rob Golum and Andy Fixmer, "Disney Raises Dividend Most in 20 Years," *Bloomberg*, Nov. 30, 2011
[49] Richard Blackden, "News Corp raises dividends for first time in two years," *Telegraph*, Aug. 10, 2011
[50] Discovery Communications, "Discovery Communications Reports First Quarter 2012 Results and Announces $1 Billion Increase To Share Repurchase Program," Press Release, May 8, 2012.
[51] Edmund Lee, "Time Warner Beats Profit Estimates, Plans $4 Billion Buyback," *Bloomberg*, Feb. 9, 2012.

Americans face constant rate increases in a down economy in order for cable programmers to run rampant with increases in quarterly dividends and stock repurchasing programs, not to mention executive pay. The heads of CBS and Discovery saw raises of more than 20 percent, resulting in $70 million and $52 million respectively.[52] The heads of all the large cable programmers take in more than $20 million annually. According to the New York Times, the median pay for the two hundred top-paid CEO's is $14.5 million.[53] Indeed, a Viacom shareholder recently filed a lawsuit contending that Viacom executives were overpaid according to the bonus formula the company instituted.[54] With these outcomes, it's difficult for any consumer simply trying to view their favorite programming to feel good about the growing portion of their household income going to this industry.

c. The Skyrocketing Costs to Consumers is a Result of a Concentrated Market for Cable Programming.

As noted above, significant concern exists for MVPDs about the rising costs of cable programming. Small cable operators in particular have long sought remedies for the tactics they face during content negotiations with large programmers. Obviously, this issue has moved well beyond simply being problematic for the smallest MVPDs.

A quick look at the top 50 subscribed cable networks aptly demonstrates this concentration. Six companies own 42 of the top 50 cable networks. These 50

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[52] Eriq Gardner and Georg Szalai, "Hollywood Executive Salaries Revealed: How the Media Moguls Measure Up," *Hollywood Reporter*, April 18, 2012.
[53] Nathaniel Popper, "C.E.O. Pay Is Rising Despite the Din," *New York Times,* June 16, 2012.
[54] Meg James, "Viacom executives were overpaid, shareholder contends in lawsuit," *Los Angeles Times,* Aug. 21, 2012.

channels are "must-have" programming, and no MVPD could exist without them. In the *Fourteenth Report*, the Commission found "Comcast, Discovery, News Corp., Disney, Viacom, and Time Warner earned more than 69 percent of total basic cable subscriber fees in 2010, and 84 percent of basic cable network advertising revenues."[55] Fitch Rating recently stated, "we believe that providers continue to have more leverage relative to distributors, especially top-tier channels that continue to command audience share/ratings."[56] News Corp. recently noted they have "continued to achieve or exceed our targets" in negotiations for affiliate fee rate increases.[57] Indeed, Viacom commented "their affiliate revenue is strong and growing, thanks to brands that remain must carry content for existing and emerging distributors alike."[58]

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[55] *See* para. 367.
[56] Tara Seals, "Affiliate Fees are Set to Rise Despite Pay-TV Swagger," *Video World Insider*, Aug. 7, 2012.
[57] News Corporation, Q4 Earnings Call Transcript, August 8, 2012.
[58] Viacom, Inc., Q2 Earnings Call Transcript, May 3, 2012.

Figure 6: The (Concentrated) Top 50 Cable Networks[59]

Owner	Networks	Networks Outside Top 50[60]
Disney	A&E, ESPN, ESPN2, Disney Channel, Lifetime, ESPNews, History, ABC Family, LMN, MLB Network, Disney XD	13
Comcast	USA, TWC, Syfy, CNBC, E!, Bravo, MSNBC, Golf Channel, NBC Sports Network	16
Viacom	Nickelodeon, Comedy Central, Spike TV, MTV, VH1, TV Land, BET, CMT	17
Time Warner	TNT, Cartoon Network, CNN, HLN, TBS, TruTV, TCM	19[61]
Discovery	Discovery Channel, TLC, Animal Planet, ID, OWN	9

It is widely understood that cable programmers force large bundles of programming to ensure all their networks receive carriage, regardless of whether that MVPD's subscribers have any interest in it. As noted in Figure 6 above, these six entities do not just control popular networks but also many others. If an MVPD wants the networks customers are watching, they'll also be carrying many additional channels, with the associated affiliate fees.[62]

In a bit of irony, four of the six filed jointly with the Commission defending these practices. They stated, "no cable operator or other MVPD is obligated to carry any

[59] C-SPAN was excluded from the top 50 because the network is not for profit entity.
[60] These six companies also have minority stakes in many channels that were not included.
[61] Includes HBO & Cinemax Channel suites.
[62] *See e.g.* George Simpson, "Why Your Cable Bill Is Just Ridiculous," *MediaPost*, May 25, 2012.

other programming services as a prerequisite to carrying their most popular individual cable programming networks."[63] That statement is highly misleading.

MVPDs are increasingly speaking out against these arrangements. Time Warner Cable's CEO stated "There are a lot of general-interest networks that have lower viewership, and the industry would take cost out of the system if they shut those networks down."[64] DirecTV told the Commission "the actual terms of these "discounted" bundles are designed to make it uneconomical for an MVPD to do anything other than capitulate to the programmers' demands." While an increasing number of MVPDs are speaking out against bundling, few of the actual details of these negotiations become public.

However, details of these coercion tactics surface occasionally. In negotiating with Viacom, Suddenlink Communications disclosed that simply opting to only carry Nickelodeon would mean paying *three* times more than the cost of taking seven networks and carrying four networks (Nickelodeon, TV Land, MTV and Comedy Central) would costs *five* times more than that the cost for 20 channels.[65]

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[63] Reply Comments of The Walt Disney Company, Viacom, Inc., News Corporation, Time Warner Inc., and CBS Corporation, MB Docket Nos. 12-68, 07-18, 05-192, p. 5, July 23, 2012.
[64] Alex Sherman, "Unwanted Cable Channels Bloat Customer Bills, CEO Says," *Bloomberg*, May 23, 2012.
[65] Suddenlink Communciations, "Viacom Negotiations: Latest Information," Suddenlink Blog, Dec. 30, 2010. [Emphasis added]

Mediacom disclosed that when requesting the price for offering just the single popular network on an a la carte basis, they were told it would not be made available at any price under those terms. The proposal they received back for the unbundled price "raised the percentage of future rate increase (already in the double-digits) by fifty percent."[66]

These tactics result in channels like VH1 Classic (Viacom), Cloo (Comcast) and History 2 (Disney), which respectively rerun back catalogues of content, earning margins over 50 percent. An SNL Kagan report noted the high margins and low popularity for these powerfully associated but remote cable networks.[67] Clearly this practice is widespread and that leverage has helped create the present environment. Many other restrictions appear to be included in programming contracts; few, if any, seem to benefit MVPD subscribers.[68]

For these large programmers, the only problem is that their isn't enough talk about how great their content is, just how much its costs. Disney's CFO recently stated, "there has been a lot of talk about pricing and not enough conversation about the value."[69] Such a view demonstrates the arrogance that has developed for entities

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[66] Comments of Mediacom Communications, MB Dockets Nos. 12-68, 07-18 and 05-192, p. 5, June 22, 2012.
[67] *See e.g.* Harry A. Jessell, "Uncovering The Truth About Retrans Value," *TVNewsCheck*, Dec. 2, 2011.
[68] *See e.g.* Ex Parte of Todd Weaver, CEO of ivi.tv, November 10, 2010. Steve Dohohue, "Disney: Cable affiliates can't carry ESPN in 'small packages," *FierceCable*, Feb. 8, 2012.
[69] Comments of James A. Rasulo, Chief Financial Officer, The Walt Disney Company, Nomura U.S. Media & Telecom Summit, May 30, 2012.

that lost any competitive discipline long ago. These behemoths intend to force price increases via the proxy of distribution networks for as long as they are able. In short, large cable programmers are abusing their market power earning economic rents on the backs of American families who are struggling in these difficult economic times.

2. Numerous Negative Effects Have Resulted From This Excessive Market Power.

It is clear that the current environment for cable programming harms consumers. While this is the most important factor for the Commission to consider, a number of resulting developments perpetuate the environment described above.

These comments are focused on the dramatic pricing power of large cable programmers. While there are certainly parallels with the current debate surrounding retransmission consent, the above analysis does not focus on that issue. In fact, it seems somewhat obvious the retransmission consent issue is in many ways a result of the environment created by cable programmers.

When seeing the amount of money being handed over by MVPDs, any content creator would pursue that additional revenue, particularly when their programming has a large audience. At its core, the retransmission consent debate is an outgrowth of the rampant abuses of the largest cable programmers (many of which also own large market broadcast stations).

Another effect of cable programmer abuses is the disincentive it creates to innovate. With the sheer amount of money generated from MVPDs, cable programmers have far less incentive to experiment with Internet-only delivery options (OVPD).[70]

As a result, significant challenges exist for OVPDs attempting to acquire large cable programmers "must carry" content, particularly in the same window it has been made available to MVPDs. Combined with MVPDs incentives to inhibit the growth of OVPDs as a competitive alternative, consumers continue to be left with extremely limited alternatives.[71] This comes just as consumers, fed up with these price increases, are exploring ways to find content for lower rates.

As a result of this lack of programming availability for OVPDs, these entities seem to have turned their attention to acquiring the back catalogues of large cable programmers; content that is already forced on MVPDs via the bundling described above. This results in even greater windfalls for large cable programmers. Meanwhile, consumers are left attempting to find some sort of reasonable alternative. In some cases, this consists of broadcast content via antennae and online offerings limited to a meager selection of old cable content.

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[70] *See e.g.* "Dish CEO blames TV networks for Internet-streaming delay," *Bloomberg News*, Sept. 14, 2012.

[71] The incentives and actions of MVPDs to limit the development of Internet video is an issue that has and should continue to receive attention but is outside the scope of these comments.

Such an effort cannot be termed a competitor for MVPD service. Indeed, Netflix told the Commission "the presence of online video providers such as Netflix will not necessarily discipline price increases for the complete bundle of MVPD video programming."[72] At the current time, any new video distributor seems only to create another window for the vertically integrated cable programmers to overcharge for content, not create the competition the Commission and the public had hoped from an open Internet.[73]

3. Conclusion

These comments are meant to assist the Commission in analyzing the MVPD ecosystem from the perspective of a consumer – a perspective the Commission should hear from far more often. In the current economy, consumers need policymakers to focus on issues that matter to them. With the average multichannel video bill over $85, this is an issue that deserves the Commission's attention and action.[74]

The Internet continues to force most every industry to adapt and better serve customers. Unfortunately, video content has not followed suit. At best, a consumer is forced to a second rate option or searching for questionably legal means to enjoy the same freedoms as viewers in other countries.[75] We can do better. The Commission should begin to identify the means to create this outcome. Recognizing the

[72] Comments of Netflix, MB Docket No. 12-203, Sept. 10, 2012, p. 7.
[73] *See e.g. Fourteenth Report* at para. 240.
[74] *See e.g.* David Lazarus, "Money Minute: $200 cable bills? Seriously?," *Los Angeles Times*, April 12, 2012.
[75] Liana B. Baker and Yinka Adegoke, "Olympics fans find ways to circumvent NBC's online control," *Reuters*, July 31, 2012.

worsening environment that currently exists, below are a few more immediate suggestions for the Commission to stand on the side of consumers.

- The Commission should include a thorough analysis of the current cable programmer environment and the effects in their upcoming MVPD Competition Report. The Commission should make explicit the role large cable programmers have in rising consumer MVPD prices.
- The Commission should build on the questions and data provided on programming costs in the *Cable Price Survey*.[76] The Commission has discovered in the past that more than half of cable operators rate increases were attributable "to increases in programming costs."[77]
- The Commission should provide fact sheets and other documentation to consumers to allow them to better understand the nature of why the rate increases are occurring so frequently.[78] As a result of better informing the public, the Commission can better mitigate the public relations uproars that occur ever more frequently during content negotiations.[79]

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[76] *See* Attachment 2.

[77] Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132, Para. 203 (Released January 8, 2001).

[78] *See e.g.* Johnny Diaz, "Cable rates are rising, but don't blame your provider – entirely," *Boston Globe*, June 5, 2011; Peter Kafka, "Hat Paying for Cable? Here's Why," *All Things* D, March 8, 2010.

[79] Berstein Research Analyst Craig Moffett has rightly noted, "The programmers are relatively insulated. The prices that they charge the cable and satellite provider never become visible to the end user.'' Johnny Diaz, "Cable rates are rising, but don't blame your provider – entirely," *Boston Globe*, June 5, 2011.

- The Commission should immediately begin a proceeding that specifically requests comment on the issues described above. This will create a repository for this heightening problem.
- The above steps are purposefully incremental and not resource intensive in order to leave room for additional actions that can help the Commission identify the best means to help consumers.

The Commission exists to ensure the United States communication ecosystem remains healthy. Congressional Policymakers requested the annual MVPD competition reports and cable price surveys for the benefit of themselves, the Commission and the public. Ultimately, the annual appraisal of this market is to ensure when problems arise, the Commission is ready to act on behalf of consumers. As an MVPD subscriber and a strong believer in public interest work, I'm requesting you act on my behalf.

Respectfully Submitted,

______/s/____________

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